DASTHIGEER MOHAMED ISMAIL *a*

v.

KERAJAAN MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 44-6-99]
4 MARCH 1999

CRIMINAL PROCEDURE: *Habeas corpus - Application for - Whereabouts of arrested person - Whether a valid ground for habeas corpus - Remand pursuant to court order - Presumption that order is according to law* *c*

CRIMINAL PROCEDURE: *Revision - Remand order - Whether there was an abuse of s. 117 Criminal Procedure Code - Whether purpose of remand for completing police investigations - Requirement of diary of proceedings in investigations - Whether complied with - Grounds for remand - Whether satisfied* *d*

This was a second *habeas corpus* application to the High Court by the applicant on the whereabouts and safety of his son ('the arrested person') who was held under remand. The first *habeas corpus* application had been rejected but the court had exercised its reversionary powers to shorten the period of remand of the arrested person from February 18, 1999 to February 15, 1999. The second application was based on the fact that the arrested person was not released on February 15 but remained under remand at all times. In fact he was arrested on February 15 on Dang Wangi Police Report 33638/98 and was held under remand until February 27 wherein he was arrested again on Tun HS Lee Police Report 396/99 and was held under remand until March 5, 1999. *e* *f*

The issues for determination were: (1) whether an application for a writ of *habeas corpus* was necessary in the circumstances; (2) whether all matters relating to any report should be disposed off within the 15 days available under s. 115 of the Criminal Procedure Code ('CPC'); (3) whether there was any basis for further remand. *g*

Held:

[1] A writ of *habeas corpus* does not apply whenever or merely because a person is arrested. When a person is remanded pursuant to a court order, there is a strong presumption that the order is according to law, and an application for a writ of *habeas corpus* cannot arise. Merely that a court has erred is not a sufficient ground since there is the right of appeal, and the High Court may act under its reversionary powers if a miscarriage of justice had occurred. *h* *i*

[2] Section 117 operates in relation to any remand in respect of any single report. The courts should apply s. 117 strictly, and exercise discretion to order remand by balancing the demands of convenience of the investigative and prosecution authorities against the fact that any remand order is a restriction of a fundamental liberty against a person who has not been convicted of the offence.

[3] The arrested person was under remand pursuant to orders obtained from the Magistrate's court at all times. If he was dissatisfied with the order of the Magistrate's court, there were the avenues of appeal and revision available.

[4] Section 117 of the CPC empowers the magistrate to make orders for further remand for the purpose of completing investigations, and not for the purpose of commencing investigations. In the instant case, it was not made clear that the arrest was for the purpose of completing police investigations. Nor was it asserted in the affidavit of the investigating officer that it was for that purpose. Further, the mandatory requirement in s. 117(i) was not complied with as there was no purported diary of proceedings in the investigations. Thus, the magistrate had no basis upon which to make any remand order.

[5] The onus was on the police to show that the remand was necessary and this was not satisfied. To add to the failure to submit a copy of the diary under s. 119 of the CPC, there was only a rubber stamp form signed by the magistrate ordering remand. Also no reasons were given as required under s. 117(iii).

[Remand order of Tun HS Lee Report No 396/99, being the effective remand order at the date of hearing, be set aside.]

Case(s) referred to:

Artatran AIR [1956] Or 129 ***(cit)***
Chong Fook Kam & Anor v. Shaahul & Ors [1968] 2 MLJ 50 ***(cit)***
Daulatram AIR [1933] O 315 ***(cit)***
Hashim bin Saud v. Yahya bin Hashim & Anor [1977] 2 MLJ 116 ***(cit)***
In re Madhu Limaye AIR [1969] SC 1014 ***(cit)***
In re The Detention of S Sivarasa & Ors [1997] 1 CLJ 471 ***(aff)***
Polis Di Raja Malaysia v. Keong Mei Cheng, Audrey [1994] 3 CLJ 362 ***(cit)***
Ooi Ah Pua v. Officer In Charge, Criminal Investigations Kedah/Perlis [1975] 2 LJ 198 ***(aff)***
Saul Hamid bin Pakir Mohamed v. PP [1987] 2 CLJ 257 ***(cit)***
Sukma Darmawan Sasmitaat Madja v. PP Cr App No W-05-73-98 ***(foll)***
Venkatraman AIR [1948] M 100 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 28, (iii), 29, 117, (i), (ii), (iii), 119, (i), (ii), 325(i)
Federal Constitution, art 5, (1), (4)
Penal Code, ss. 34, 148, 302, 392, 397

For the appellant - Hamid Sultan Abu Backer; M/s Hamid Sultan & Rakan-rakan
For the respondents - Mohd Fauzi Mohd Nasir; DPP

Reported by Sherin Kunhibava & Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

The tortuous facts of this application are as follows:

The applicant Dasthigeer bin Mohamed Ismail is the father of one Shahul Hameed bin Dasthigeer (the arrested person). The latter was arrested on 19 January 1999 pursuant to Kajang Police Report 424/99 lodged on 10 January 1999. On the next day, the Magistrates' Court remanded the applicant for one week until 27 January 1999 under remand order 57/99. The remand order was further extended for a period of 3 days until 30 January 1999. Notwithstanding that there was no further remand order, the applicant, according to his counsel, was kept in police custody. According to his counsel, he was brought before the magistrate, charged and released on police bail of RM4000 on 4 February 1999. As soon as bail was posted, he was re-arrested under Dang Wangi Police Report 177/99. He was remanded by the Kuala Lumpur Magistrate's Court until 10 February 1999. This remand was extended to 18 February 1999.

On the next day, a *habeas corpus* application No. 44-4-99 (the first application) was filed by counsel on behalf of the applicant. The application was heard on 13 and 15 February 1999. The court had rejected the *habeas corpus* application but exercised its revisionary powers to shorten the period of remand to 15 February 1999.

The arrested person was released upon the order having been communicated, but within minutes of release, was re-arrested at 6.00 p.m. under Dang Wangi Police Report 33638/98 lodged on 25 December 1998. Because of intervening public holidays he was brought before the Magistrate's Court on 18 February 1999 where he was remanded to 27 February 1999.

The applicant filed another writ of *habeas corpus* (the second application) on 25 February 1999.

On 27 February 1999 he was released on police bail of RM2000 in respect of that Dang Wangi Police Report 33638/98. He was however arrested at the same time under Tun HS Lee Police Report 396/99 lodged on 5 January 1999, and on this separate report he was remanded until 5 March 1999.

The Kajang Police Report 424/99, Dang Wangi Police Report 177/99, Dang Wangi Police Report 33638/98 and Tun HS Lee Police Report 396/99 are classified under i) sections 392, 397 Penal Code read with s. 34; ii) sections 302 and 397 Penal Code; iii) sections 392 and 397 Penal Code; and iv) section 148 Penal Code respectively.

The First Application

Strictly speaking, the first application is not relevant to the current application. However the second application repeats the basis of the first application as is evident from the supporting affidavit to the second application. In deference to counsel's request that a ruling on the questions of law involved is desirable, and since the same questions are applicable in the second application, I accede to that request.

In his supporting affidavit to the first application the applicant had deposed that upon being informed of re-arrest of his son on February 4, 1999 under the Dang Wangi Police Report:

> 11. Dengan serta-merta saya telah mengarahkan Peguamcara saya untuk bertanya di Mahkamah Majistret Jalan Raja tentang lokasi anak saya. Sesalinan surat kepada Majistret Jalan Raja dikemukakan, ditunjukkan kepada saya dan ditandakan di sini sebagai Ekshibit "DM-3".
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> 12. Pada had yang sama, Peguamcara saya telah pergi ke Mahkamah Majistret Jalan Raja di mana Tuan Pendaftar telah memaklumkan bahawa anak saya sebenarnya telah dibawa ke Mahkamah Majistret Jalan Raja pada 3 hb Februari, 1999 dan telah direman. Perintah Reman diberikan oleh Puan Majistret Lailatul Zuraida binti Harun. Peguamcara saya telah pergi berjumpa dengan Puan Majistret dan Puan Majistret telah memberitahu Peguamcara saya untuk merujuk kepada Balai Polis, Jalan Dang Wangi.
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> 13. Pada had yang sama juga iaitu 4 hb Februari, 1999 Peguamcara saya telah membuat pertanyaan di Balai Polis Jalan Dang Wangi. Seorang pegawai bernama Korporal Latipah telah mengesahkan kepada Peguamcara saya bahawa anak saya telah pun dibebaskan melalui jaminan polis pada 3 hb Februari, 1999 dan dia tidak tahu di mana dia berada tetapi kami boleh membuat pertanyaan selanjutnya dengan Pegawai menyiasat iaitu lnspektor Zulkarnain.
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> 14. Pada 5 hb Februari, 1999 Peguamcara saya sekali lagi telah pergi ke Balai Polis Jalan Dang Wangi bertanya tentang lnspektor Zulkarnain tetapi beliau tidak ada di pejabat.

15. Saya mengatakan bahawa anak saya berada di dalam tahanan polis sejak 19 hb Januari, 1999. Pada waktu ini, saya tidak tahu di mana dia berada dan saya khuatir akan keselamatannya.

Ignorance has made its considerable contribution to apprehension in this case. Upon his re-arrest on 4 February 1999 pursuant to the Dang Wangi report, the appropriate place to refer to is the Dang Wangi Police Station. Instead of advising the client, counsel followed the client's instruction and proceeded on a barren enterprise, only to be referred back to the Dang Wangi Police Station. Only on 5 February did counsel proceed to the said police station to seek Inspector Zulkarnain. Upon being informed he was not in his office, the supporting affidavit was sworn at 2.00 p.m. on 5 February 1999, and on the same day the application was filed. It would seem there was a greater alacrity and effort to resort to rushing to the courts than in applying oneself to making an appointment to see the Inspector concerned. Merely that he was not in the office does not constitute a refusal to give information as to the whereabouts of the arrested person.

The application, for the stated purpose of discerning the whereabouts of the arrested person, is premature. That the applicant would rush so prematurely to the court would appear to pander more to the accusatorial fashion of suggesting mistreatment, and regrettably reduces the credibility of the application.

The accusation by the applicant was based on what he said he was told by the son on 27 January 1999. The son had complained to the magistrate on that day and on 30 January 1999. The magistrate before whom the son appeared however saw fit to advise the son to lodge a police report if he saw fit. Obviously the magistrate, seeing and hearing him first hand did not discern any substance to the allegation from his appearance and did not take cognisance of the complaint.

Such complaints of ill-treatment is fortunately not very common, and even more rarely supported by evidence in the form of unexplained marks or corroboration. The fact the allegation is easy to make, and attempts to appeal emotionally to the court for empathy natural, magistrates learn quickly to look for unexplained marks or corroboration before deciding on any course of action. No such evidence is alleged even at this stage. Indeed the rush to file an application before the court instead of making at least another effort to see Inspector Zulkarnain lends nothing to the credibility of the applicant, and suggests strongly that the course adopted by the magistrate is the correct course.

As to whether a *habeas corpus* application ought to be entertained, let alone granted has been dealt with by the Court of Appeal in *Sukma Darmawan Sasmitaat Madja v. PP* Cr. App. No. W-05-73-98 where it was held that available avenues of recourse ought to be resorted to before making an application for issue of a writ of *habeas corpus*. There is no suggestion bail had been applied for and denied. Bail could be applied for not necessarily at the remand appearance. If bail is denied then an urgent appeal is in order.

It has never been suggested that a writ of *habeas corpus* applies whenever or merely because a person is arrested. Article 5(1) of the Federal Constitution provides that "No person shall be deprived of his life or personal liberty save in accordance with law." When a person is remanded pursuant to a court order, there is a strong presumption that the order is according to law, and an application for a writ of *habeas corpus* cannot arise. Until that order has been set aside by a court of competent jurisdiction, it is an order with force of law. Merely that a court has erred is not a sufficient ground since there is the right of appeal, and in additionally in suitable cases, High Court may act under its revisionary powers if a miscarriage of justice had occurred.

In this case it is clear the remand is pursuant to a court order, and the application for the issue of a writ of *habeas corpus* must be rejected.

However the respondents having conceded that the detention of the arrested person between 30 January 1999 until 4 February 1999 was not pursuant to proper authority, the just order in the circumstances is, by invoking the revisionary powers of the High Court to adjust the period of the remand order to take account of the four days detention, by shortening it to 15 February 1999.

A key part of the argument for the applicant is that the police ought, in the fifteen days available under s. 117 of the Criminal Procedure Code, dispose of all matters relating to any report made before such arrest. That would prevent abuse by resorting to multiple reports being the basis of various fifteen day remands.

While it is true that there is the possibility of abuse, such mere possibility cannot prevent the effect of a true interpretation of the meaning of a statutory provision. Section 117 operates in relation to any single report, any single investigation, any single arrest, and therefore any remand in respect of any single report. To restrict the interpretation of s. 117 to the scope proposed in the submission ignores the fact that alleged offences may be committed and reported in different police districts and police stations, and as a result fall under the jurisdictions of not only different police stations but also different

police districts and investigation officers who in the ordinary performance of their duties are properly independent. Indeed to accept the interpretation proposed by counsel would operate in favour of those who commit multiple crimes by limiting the police to less time per alleged offence within the fifteen day remand allowed under s. 117.

The proper approach to avoid abuse is not by way of an interpretation regardless of the ordinary meaning of s. 117, but by way of the courts applying s. 117 strictly, and exercising its discretion to order remand under s. 117 not solely by the demands of convenience of the investigative and prosecution authorities, but by balancing such needs against the fact that any remand order is a restriction of a fundamental liberty against a person who has not been convicted of the offence. Magistrates must therefore exercise their discretion to remand into custody with vigilant judiciousness.

There is nothing in this case to show that the magistrates in Kajang and Kuala Lumpur had failed to exercise their discretion properly. Equally the Dang Wangi Police cannot know the arrested person was detained improperly between 30 January 1999 until 4 February 1999 when he was charged and released on bail by the Kajang Police. To his credit the Federal Counsel conceded on the issue. However, in my considered opinion that cannot affect or taint the decision of the magistrate in Kuala Lumpur who considered the question of remand solely from the view of Dang Wangi Police Report 177/99 before him.

The Second Application

Apart from repeating the matters dealt with in the first, this application relies on the fact the arrested person was not released on 15 February, but was arrested and remained under remand at all times. The implication was that there was a contempt of court. The applicant's son was in fact arrested on 15 February 1999 on Dang Wangi Police Report 33638/98, and was remanded until 27 February 1999. On that date he was arrested under Tun HS Lee Police Report 396/99, and was remanded until 5 March 1999.

It is clear then the arrested person was under remand pursuant to orders obtained from the Magistrate's Court at all times. If he is dissatisfied with the order of the Magistrate's Court, there are the avenues of appeal and revision available. Unlike an arrest the matter is before the court. There is no ground to resort to *habeas corpus* in such circumstances, where an application is made by the father who himself may not know what his son has or has not been doing. It is better in such circumstances that the arrested person himself files an appeal.

In perusing the copies of applications for remand orders, the magistrate's notes of the remand hearings, and the affidavits filed by the parties, I had thought fit to act in revision under s. 325(i) of the Criminal Procedure Code, and set aside the remand order made on 3 March 1999 in respect of Tun HS Lee Police Report 396/99, being the effective remand order at the date of hearing. As indicated I give now my written reasons for doing so.

Article 5 of the Federal Constitution and s. 117 Criminal Procedure Code

The starting point is that an arrest, let alone detention under remand, is a violation of a person's personal liberty. It can only be defended if it is in accordance with law. Article 5 of the Federal Constitution provides:

> 1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> 2) ...
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> 3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> 4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
>
> ...

Since a person can only be arrested in accordance with law, it must follow that the arrest must be upon reasonable grounds to believe that he has committed an offence. There should be no difficulty to inform him as soon as may be if not immediately of the grounds of his arrest. In *Ooi Ah Pua v Officer In Charge, Criminal Investigations Kedah/Perlis* [1975] 2 MLJ 198 FC, is authority that the right to consult a lawyer may be delayed. Suffian LP said:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

The Criminal Procedure Code provides for the arrest, bail, remand, trial, fine and imprisonment, to mention some of examples of deprivation of liberty and property, is to be found in the Criminal Procedure Code. The provisions as to remand is consonant with and amplifies upon Art. 5(4). Specifically with regard to remand, the Code provides:

> 117 Procedure where investigation cannot be completed within twenty-four hours
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> (i) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to a magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time [produce the accused before such Magistrate].
>
> (ii) [The Magistrate before whom an accused person is produced] under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be [produced before a magistrate having such jurisdiction][or, if the case is triable only by the High Court, before himself or another magistrate having jurisdiction with a view to committal for trial by the High Court.]
>
> (iii) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

It should be noted that the terms 'the accused' and 'accused person' in sub-ss. (i) and (ii) above refer to the arrested person. At the stage of a remand under s. 117 there would not have been charges filed against the arrested person. Further, the common term 'remand' is used in this judgement in reference to detention in custody under the Code, and to distinguish it from detention under other laws or imprisonment pursuant to conviction.

That the right to consult a lawyer should not be delayed beyond the period remand during police investigations under s. 117 was dealt with by Raja Azlan Shah FJ (as he then was) in *Hashim bin Saud v. Yahya bin Hashim & Anor* [1977] 2 MLJ 116:

> We therefore did not agree with the proposition of law propounded by the learned Judge that the right to Counsel could only be exercised after the completion of the period of police investigation under s. 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a Court which limits the concept of fairness to the period of police investigation is completed recognises only the form of criminal justiciable process and ignores its substance.

Raja Azlan Shah FJ in that case stressed:

> The onus of proving to the satisfaction of the Court that giving effect to the right to Counsel would impede police investigation or the administration of justice falls on the police.

The order of the magistrate in a remand hearing has been held in *Chong Fook Kam & Anor v. Shaahul & Ors* [1968] 2 MLJ 50 to be a judicial act. That decision underscores s. 117(iii) that the magistrate in authorising remand shall record his reasons for doing so. It is imperative to do so to enable review of the order if it should arise, and failure to so may gravely prejudice the person so remanded: *Daulatram* AIR 1933 O 315.

Consideration of the reasons for authorising remand cannot be divorced from the question of the purpose of remand envisaged under s. 117. Section 117 empowers the magistrate to make orders for further remand for the purpose of completing investigations, and not for the purpose of commencing investigations. The pre-requisites are i) there are grounds for believing that the accusation or information is well founded and ii) it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s. 28. Then, if remand is desired, the police officer making the investigation shall forthwith transmit to a magistrate a copy of the entries in the diary relating to the case and must at the same time produce the accused before such magistrate.

It is necessary at this point to refer to s. 119 of the Code as to the diary. The section provides:

> 119 Diary of proceedings in investigation
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> (i) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth –
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> (a) the time at which the order, if any, for investigation reached him;
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> (b) the time at which he began and closed the investigation;
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> (c) the place or places visited by him; and
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> (d) a statement of the circumstances ascertained through his investigation.
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> (ii) Notwithstanding anything contained in the Evidence Ordinance 1950, an accused person shall not be entitled, either before or in the course of any inquiry or trial, to call for or inspect any such diary: provided that if the police officer who has made the investigation refers to the diary for the purposes of section 159 or 160 of the said Ordinance such entries only as such officer has referred to shall be shown to the accused, and the Court shall at the request of such officer cause any other entries to be concealed from view or obliterated.

The mandatory requirement in s. 117 to give to the magistrate a copy of the investigating officer's diary of proceedings in the investigation, the contents of which is specified in s. 119(i) is to enable the magistrate to determine that the period of detention in custody between arrest and the appearance before the magistrate is accounted for, and to consider it as one of the factors in determining the credibility of the grounds advanced for further remand. The diary should be able to show to the magistrate that there are grounds for believing that the person before him is the person involved in the accusation in the police report, and to justify the period of further remand requested.

Remands should not be taken lightly as a matter of mere formality (see for example *Artatran* AIR 1956 Or 129). By comparison, sentencing a person, whether to a fine or a term of imprisonment, is a less onerous burden since it is only done with the confidence that the person being sentenced has been proven beyond reasonable doubt to be guilty. A remand order, on the other hand, must always be considered along with the knowledge that the person sought to be remanded has not been proven beyond reasonable doubt to be guilty, and is entitled to be presumed to be innocent. It must always be borne in mind that be it a remand or imprisonment, the subject is deprived of his liberty. It follows that a remand order cannot be based solely on that a serious crime has been committed and the person brought before the magistrate seems to be a suspicious person, but must be based on some degree of confidence that he is the wrongdoer, that his remand is necessary to complete investigations and which cannot be achieved if he is released on bail. The onus is, however, upon the prosecution to advance the grounds. In a case dealing with remands and ss. 117 and 119, *In re The Detention of S Sivarasa & Ors* [1997] 1 CLJ 471, KC Vohrah J cited the following passage from *Polis Di Raja Malaysia v. Keong Mei Cheng, Audrey* [1994] 3 CLJ 362; [1994] 3 MLJ 303 with approval:

> These details provide the true proceedings in the investigation in compliance with what is required by s. 119(1) of the CPC. A copy of this is what the officer must supply the magistrate under s. 117. This to obviate the necessity of the magistrate having to examine the complainant and recording the examination (see Ch. XV and s. 133; compares. 117(3) with s. 135(2) of the CPO). So I have at this stage to say that the police in this case did not transmit to the magistrate a copy of the proper entries in the diary. This goes against the requirements of s. 117. How then could the magistrate (or Registrar in our case) make any decision to continue detention of the respondent? As a matter of law, not only must the diary be in the form specified by s. 119 of the CPC but it must also be replete with grounds indicating that the information against the accused (or respondent) is well-founded ... .

In holding that an arrested person is entitled to have the benefit of counsel at the time of his remand hearing in *Saul Hamid bin Pakir Mohamed v. PP* [1987] 2 CLJ 257, Edgar Joseph Jr J (as he then was), in his usual careful and perceptive manner, had reminded that s. 119(ii) ensures that neither the arrested person or his counsel has access to the information in the diary, and the question of premature disclosure of any prosecution case does not arise. Indeed the presence of counsel, making representations on behalf of the arrested person and acting ethically in the interests of the balance of justice between the public interest and the individual interest, rather than just interest of any particular party, would be of assistance and is welcomed.

In view of ss. 119 and 117, the necessity that the investigating officer maintains a diary of proceedings in the investigation and to transmit a copy of it to the magistrate when making an application for remand cannot be over-emphasised. Without a copy of the diary of proceedings in the investigation, the magistrate has no foundation to evaluate the application and to make an order of remand.

Earlier in this judgement I had occasion to mention that an arrest must be upon reasonable grounds to believe that the arrested person has committed an offence and that the arrest and remand under s. 117 is to complete investigations. It is clear that the object is that the person be brought before the court with the appropriate jurisdiction to be charged with an offence. If attendance in court to be charged is the only consideration, then in the absence of any reasonable belief he might abscond, the person could be released on police bail under s. 29 of the Code.

In considering remand under s. 117 where investigations cannot be completed within 24 hours after arrest, it is proper for the magistrate to consider measures to ensure the attendance of that person in court to be charged. If police bail is more appropriate, a remand order could be refused as unnecessary. It follows then that the need for remand in custody involves consideration of questions similar to bail applications, such as the likelihood of the person, having been arrested and knowing the likelihood of being charged, not attending court on the day appointed if released, absconding altogether to avoid being charged, likelihood of the person interfering with witnesses etc. Depending upon the reasons for the remand, the magistrate is not precluded from ordering remand in prison custody rather than police custody: see *Venkatraman* AIR 1948 M 100. Remand to police custody should not be allowed as a matter of course: *Khairati* AIR 1931 L 476. In all cases the magistrate must apply his mind to all relevant matters: *In re Madhu Limaye* AIR 1969 SC 1014. It was held in

Artatran AIR 1956 Or 129 it is incumbent upon the police to satisfy the magistrate about the existence of sufficient evidence and that further remand might facilitate obtaining further evidence.

To summarise, for the application under s. 117 supported by a copy of the diary of proceedings in investigation the police must show firstly, that the first 24 hours had been usefully utilised as far as is possible; secondly, why and for how long the arrested person should continue to be held in custody and not be released on bail; and thirdly, why the arrested person should be held in police custody and not in prison custody.

The Tun H S Lee Police Report 396/99

The remand order under the Dang Wangi Police Report 33638/98 expired on 27 February 1999. According to the affidavit of the investigating officer, Inspector Selvarajan a/l Muniandy, Shahul Hameed bin Dasthigeer was arrested on that date at about 1.35 p.m., and I quote:

> bersabit dengan Laporan Polis Tun H S Lee No. 396/99 untuk tujuan siasatan di bawah Seksyen 148 Kanun Kesiksaan. Salinan Laporan Polis tersebut ...

The application does not make clear that the arrest was for the purpose of completing police investigations. Nor is it so asserted in the affidavit of the investigating officer.

Now, 27 February 1999 was a Saturday. It was not possible to bring him before a magistrate on Saturday afternoon or Sunday. It was therefore reasonable to hold him until Monday to be produced before the magistrate the following Monday, 1 March 1999. The period between Sunday and Monday would in the circumstances be part of the time necessary for the journey from the place of arrest to the Magistrate's Court under s. 28(iii) of the Code, and which time period is excluded from the calculation of the 24 hours.

Inspector Selvarajan a/l Muniandy then said in relation to the remand order of 1 March 1999:

> (Para 5) ..... Sesalinan Permohonan Reman di bawah Seksyen 117 Kanun Prosedur Jenayah tersebut adalah dilampirkan dan ditandakan sebagai eksibit 'SM-1'

This statement from the affidavit leaves no room for dispute whether the document "SM-1" dated 1 March 1999 and bearing the title **"Memohon Saspek Ditahan Dibawah Sek 117 KPJ**" is an application or a copy of the diary of proceedings in the investigation by the investigation officer. It does

not purport anywhere on the document that it is a copy of the diary of proceedings in the investigation by the investigation officer. Clearly s. 117(i) has not been complied with. In my view the magistrate had no basis upon which to make any remand order since no other information other than "SM-1" was given. In *In re The Detention of S Sivarasa & Ors* [1997] 1 CLJ 471, KC Vohrah J had said in such a case the magistrate has no jurisdiction to make the remand order.

The document "SM-1" provides no assistance towards making any order. It is a summary of the substance of a report numbered 396/99 lodged by one Sarayana a/l Samugam lodged at the Tun H S Lee Police Station on 5 January 1999. The assailants concerned were not identified, no names were mentioned, and was classified under s. 148 of the Penal Code. There is no suggestion of any investigation upon that report leading to any reasonable belief that Shahul Hameed bin Dasthigeer was one of the assailants. The offence under s. 148 of the Penal Code is not of a similar nature as the other offences for which he was arrested which might conceivably indicate a common *modus operandi*, and suggesting involvement of the same persons.

The reasons given in the application "SM-1" for further remand are:

1. Siasatan keatas saspek tidak dapat di jalankan dalam masa yang pendek.
2. Untuk menjalankan soal siasat keatas saspek mengenai beberapa saspek yang masih bebas melalui saspek ini.
3. Siasatan awal juga mendapati saspek memang terlibat dalam kejadian kes ini dan juga mengesan pemilik kereta No. WDX 9157 yang juga merupakan seorang saspek yang masih bebas daripada tindakan Polis yang mana saspek tahu tempat kediaman saspek lain.
4. Untuk merakamkan percakapan ??? saspek dibawah Sek 113 KPJ.
5. Untuk memperkemaskinikan kertas siasatan sebelum untuk dituduh.
6. Utk ??? semakan mengenai kesahihan kewarganegaraan saspek.

There was no suggestion that the arrested person was willing to make a statement. To hold a person under remand until he gives a statement under s. 113 would only make the statement inadmissible. Checking on his status as a citizen or the ownership of the vehicle WDX 9157 cannot be affected by his release. Obviously no one else has been identified. The statement the arrested person is involved is not supported by any substance, and in fact a close reading of the application shows little more than suspicion. That cannot be enough to satisfy the onus on the police to show that a remand is necessary, and the magistrate ought not have granted the remand order.

To add to the failure to submit a copy of the diary under s. 119 of the Code, there was only a rubber stamp form signed by the magistrate ordering remand until 5 March 1999. Regrettably no reasons was given for the remand order as required under s. 117(iii).

For the above reasons I had ordered that the remand order in respect of Tun HS Lee Report No 396/99 be set aside.